From: Norman J. Harman Jr.
To: Microsoft ATR
Date: 1/24/02 9:19am
Subject: Microsoft Settlement

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[CIS] below refers to the document available on Jan 23,2002 at
http://www.usdoj.gov/atr/cases/f9500/9549.htm
[PFJ] below refers to the document available on Jan 23,2002 at
http://www.usdoj.gov/atr/cases/f9400/9495.htm
[complaint] below refers to the document available on Jan 23,2002 at
http://www.usdoj.gov/atr/cases/f1700/1763.htm

To whom it may concern,

I have followed UNITED STATES OF AMERICA v. MICROSOFT CORPORATION for a long time and have spent the last 9, and counting, hours reading essays, editorials and court documents relating to it. I certainly can not claim to know all the law that applies, nor fully comprehend the history of how we (The People of the United States of America) arrived at this point in our case against Microsoft Corporation. However, I do understand that Microsoft's illegal monopoly injures me and that the Proposed Final Judgment has little to no chance of stopping Microsoft from further injuring me nor will it noticeably reduce its illegal monopoly power.

Technology changes too fast, Microsoft has too much money, too many lawyers, and too much industry influence (the money and influence both aided by its monopoly) for any such complex, overly-specific, and non-comprehensive remedy to be effective.

It is filled, with loop-holes, half-measures, inconsistencies, has no "bite ", and in the end it does not even address the root of our (The People of the United States) complaint that "Microsoft possesses (and for several years has possessed) monopoly power in the market for personal computer operating systems"

I ask, during these proceedings has it not been difficult and expensive for the plaintiffs to take Microsoft to court? Has it not been a constant tribulation, with Microsoft's legal team using every tactic and trick to delay and hinder (all within the law of course) our case? What makes the parties involved believe for an instant that a 3 person panel and the future victims of Microsoft's illegal activities will be able to hold Microsoft to the complex terms of the PFJ?

Few companies and virtually no individuals are capable or willing to take an entity, such as Microsoft, to court that has monopoly status in their industry not to mention 44 billion in *current* assets (3 billion of that in cash) [Q1-2001 $US as reported by fool.com]

I understand that neither is the US government;

"First, the United States considered litigation of the issue of remedy in the District Court. The United States balanced the strength of the

provisions obtained in the Proposed Final Judgment; the need for prompt relief in a case in which illegal conduct has long gone unremedied; the strength of the parties' respective positions in a remedies hearing and the uncertainties inherent in litigation; and the time and expense required for litigation of the remedy. The United States determined that the Proposed Final Judgment, once implemented by the Court, will achieve the purposes of stopping Microsoft's unlawful conduct, preventing its recurrence, and restoring competitive conditions in the personal computer operating system market, while avoiding the time, expense and uncertainty of a litigated remedy. Given the substantial likelihood that Microsoft would avail itself of all opportunities for appellate review of any non-consensual judgment, the United States estimated that a litigated result would not become final for at least another two years. ..."
Still, that is lame. It makes me sad to be American. If my government can't stand up to the corporate criminals of our age and win, who can? I don't know what if any impact anything I could possibly say or add to these proceedings would have. Nor am I so vain as to believe what I say is novel, new, or 'the answer'. It's just that I couldn't sit by in silence.

When contemplating adequate remedy one must consider the following: That Microsoft has hugely profited (both in monetary terms and in market position) from its illegal activities for many years, and they continue to profit every single day. That this is not the first time they have acted contrary to U.S. law. That their illegal acts have destroyed numerous companies, ruined lives, and swallowed entire markets whole. Finally, that they have been found guilty of violating US law.

This is not about punishing Bill Gates or Microsoft because they were too successful as I have often heard. Microsoft and it's management was not better or smarter, they simply cheated.

Personally, I believe Microsoft (or at least its operating system portion of the company) has illegally (in violation of the Sherman Act) "murdered" (run out of business) various corporate persons among other crimes and deserves the corporate "death penalty". It, the OS division, should be shut-down. Its operating system source code in all its numerous forks and varieties should be stripped from it and placed in the public domain or under the government's choice of open-source license. Unfortunately, for various political and economic reasons I also believe the plaintiffs can never successfully carry through on such a course.

Still, I agree with the CIS that,

"Microsoft has monopoly power in the market for Intel-compatible personal computer operating systems and undertook an extensive campaign of exclusionary acts to maintain its operating system monopoly"

No remedy can be just & effective unless it eliminates that monopoly.

Some specific thoughts on various sections of the PFJ:

IV.B.3 Why does Microsoft get to choose one of the TC members? It makes *no* sense. They have violated serious laws. They will try to subvert the PFJ (I base that opinion on their actions during these proceedings, their demonstrated contempt of the plaintiffs and original judge, as well as their demonstrated disrespect of U.S. laws). Do not give them an advantage by allowing them to appoint one of the TC's.

IV.B.8.e "The TC shall report in writing to the Plaintiffs every six months
"

I believe these reports should be published and publicly available. Possibly, with provisions for blacking-out/separate (non-published) attachments for any trade secrets or other specific confidential information.

IV.B.10 "No member of the TC shall make any public statements relating to the TC's activities."

I don't believe this provision is in our (The People of the United States) best interest.

IV.D.4.d "No work product, findings or recommendations by the TC may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the TC shall testify by deposition, in court or before any other tribunal regarding any matter related to this Final Judgment. "

I don't understand what this provision is attempting to accomplish. I don't see how this provision eliminates or limits Microsoft's illegal operating system monopoly nor how it facilitates the enforcement of the PFJ.

VI.J.2 "is Trademarked"
and
VI.J "Software code described as part of, and distributed separately to update, a Microsoft Middleware Product shall not be deemed Microsoft Middleware unless identified as a new major version of that Microsoft Middleware Product. A major version shall be identified by a whole number or by a number with just a single digit to the right of the decimal point. "

This provision provides for two trivial methods with which Microsoft can evade sections of the PFJ. By not trademarking some future "middleware' or renaming existing "middleware and not trademarking it. And by using silly version numbers. Like, say "Windows XP' instead of "Windows 2002' or 7.0.0.0.1, or ... well the possibilities are nearly infinite.

VI.K.1 "Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express "

This misses several (Outlook, C#, .net, etc.) But more importantly the author fails to comprehend the futility in trying to fixate specific (software) technology in law. It (software technology) is a spritely and a ever-changing target. Far more ellusive than *anything* the government has tried to legislate in the past. The government must look away from past methods of law making in order to adapt to this new and novel issue.

Comments prompted by the CIS:

Why does the PFJ exclude server and embedded versions of MS operating systems? Is it because the government does not deem Microsoft to have a monopoly in these fields? Is there "prior-restraint" limitations to anti-trust enforcement? That would be a shame. It would be hard to name a more flagrant, consistent, and comprehensive contemporary user of illegal monopoly power than Microsoft. I have no doubt that they are currently and in the future will use their monopoly to illegally compete in these markets. The government should have no doubt either and address this issue today.

Why are only the "20 largest competitively significant OEMs" protected in Section III.A? Do only large companies suffer from Microsoft's illegal monopoly? In fact, large companies are the most capable at fighting Microsoft's illegal practices. With the prospect of facing Microsoft's legal juggernaut small companies and individuals for the large part can't even afford to take their grievances against Microsoft to court. Small firms and individuals need government protection from Microsoft's illegal activities the most.

The following point is open for debate but I believe history shows that small firms and individuals account for the larger percentage of 'innovation' in the computer software industry. They are the most likely source of any threat to Microsoft's OS monopoly. Just look at the current threats Microsoft is facing; Linux, Apache, Samba. And past threats; Netscape was a small company, SmartDrive competitors (names lost in time), 4DOS, DrDOS, etc.

How does defining the ill-conceived "20 OEM's" as being

"the highest worldwide volume of licenses of Windows Operating System Products"
encourage or allow the erosion of Microsoft's illegal operating system monopoly? One might imagine that the 20 largest sellers of Windows licenses could possibly have a vested interest in perpetuating a Windows OS monopoly as long as they themselves don't get 'squeezed' too hard. This is not reducing the monopoly just extending it to a trust. A trust that is hopefully still illegal under The Sherman Act.

This statement:

"...and promote particular types of software that could erode Microsoft's

monopoly " CIS

Just makes me mad. How wishy-washy is that? Come on, Microsoft is THE monopoly power in the U.S. computer industry if not in the entire U.S. economy and has been for several years. Why is the government pursuing something that maybe, could, just might slightly reduce Microsoft's monopoly. The plaintiffs SHOULD BE seeking a decisive, absolute, expedient remedy.

Section III.E is good in spirit. But, stipulating that Microsoft provide protocol licenses under "reasonable and non-discriminatory terms" is not sufficient. Protocols and API's should not require a license to implement, period. But, for any communication or 'Middle-ware' protocol or API that Microsoft chooses to bolt a license onto that license must be made available to any person, organization, or company without fee, and without restriction.

In addition Microsoft should be prohibited from implementing pre-existing API's and protocols in slightly or grossly different and/or incompatible ways. As suggested by one of the remedies reviewed and discarded [as listed in the CIS].

The exclusions for "anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems" are huge. I'm only a middling software engineer and I can devise any number of methods to render API's and/or protocols effectively useless without portions that a half-way decent lawyer could argue fall under those categories. Microsoft has enough middling software engineers and half-way decent lawyers to evade much of the PFJ in such a manner.

The PFJ focuses on commercial competitors and large ones at that. This is wrong. The Internet (and it is The Internet, ill advised or not, that the complaint envisions as the tool to end Microsoft's OS monopoly) largely exists and operates on software made and supported by small companies, government agencies, and non-profits. (DNS - bind and others, email - sendmail and many others, FTP - many, Apache, PERL, PHP, MySQL, Linux, various BSD flavors, and the list goes on)

I disagree with the following statement or more accurately I disagree with the conclusion that it is the most workable / best path the government should pursue in order to eliminate Microsoft"s illegal monopoly.

"The formidable applications entry barrier may be eroded through platform software known as "middleware." "

The concept the PFJ defines as middleware was a new market segment that several companies (Netscape and SUN among others) attempted to create in their desperate search for a niche in which to compete free of Microsoft's monopoly. I believe it is a risky ploy. Not at all assured to 'erode'

Microsoft's monopoly status with or with-out the aide of the PFJ provisions.

Finally,

"The ubiquity of the Windows operating system thus induces developers to create vastly more applications for Windows than for other operating systems. The availability of a rich array of applications in turn attracts consumers to Windows. A competing operating system will not attract large numbers of users unless those users believe that there is and will continue to be a sufficient and timely array of applications available for use on that operating system. Software developers, however, have little incentive to write applications for an operating system without a large number of users." CIS

The above paragraph suggests several effective remedies. Namely increasing the number of users of competing operating systems and increasing the number of applications available for competing operating systems. The U.S. and state governments have the power to do these things, perhaps not directly as a restriction on Microsoft but through other means. Just make Microsoft foot the bill. A very simple, enforceable, and in my mind just remedy would be to have Microsoft forfeit 1/3 of it's 'current assets' (about 14 billion) or X billion per year for X years, whatever. Put one billion into a trust in order fund potential future cases against Microsoft. The rest used in any number of ways to promote serious private and public sector threats to Microsoft's illegal operating system monopoly.

I arrived at some of the conclusions above in part because I disagree or find erroneous the following parts of the complaint. Most of it is just too old and doesn't apply to the U.S. software market as it sits today.

I.3 "Because end users want a large number of applications available, because most applications today are written to run on Windows, and because it would be prohibitively difficult, time-consuming, and expensive to create an alternative operating system that would run the programs that run on Windows"

It is debatable whether most end users want a large number of applications available. Most want; MS Office, a HTTP/HTML browser, and E-mail. With a smattering wanting instant-messaging and file sharing. Although, game players want large number of application(games) available. I know several people who maintain a Window OS solely in order to play games. Everything else they do with some other operating system.

"most applications today are written to run on Windows"
Is only true if one does themselves the great disservice of limiting their definition of 'applications' to those sold commercially by large companies.

The wine project [www.winehq.com] and Mandrake's gaming distribution [http://www.linux-mandrake.com/en/games8.0.php] demonstrate how it is not "prohibitively difficult, time-consuming, and expensive to create an alternative operating system that would run the programs that run on Windows"
Just hard and risky in the face of Microsoft's illegal monopoly. The fact that both projects are open-source might be a clue as to effective tools with which to eliminate Microsoft's illegal monopoly.

I.4 Follows on the questionable points of I.3 and is therefore questionable itself. As proof I point to Linux in the server and other markets. Linux *is* a "direct, frontal assault by existing or new operating systems" and has created significant new markets, new companies, and huge opportunity for existing companies to compete against Microsoft even with its illegal monopoly.

I.6 Maybe when this was written, but Microsoft eliminated this 'threat' long ago.
I.7 - I.38 If the government believes this then they should really want to limit Microsoft in the server market. Microsoft's recent and continuing practices with Kerberos, DNS, Active Directory, and IIS demonstrate its continued use of monopoly powers in one market to extend them into another, (server-infrastructure / client-browsers)

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It would have been nice to see some commentary and detail on why and how the government came to believe the following remedies (taken from the CIS) were not in the our (The People of the United States) best interest.

"A requirement that Microsoft license the Windows source code to OEMs to enable them to modify, compile and distribute modified versions of the Windows Operating System for certain limited purposes, such as automatically launching Non-Microsoft Middleware, operating systems or applications; setting such non-Microsoft Middleware as the default; and facilitating interoperability between Non-Microsoft Middleware and the Windows Operating System."

"A requirement that Microsoft disclose the entire source code for the Windows Operating System and Microsoft Middleware, possibly within a secure facility for viewing and possibly without such a facility."

"A requirement that Microsoft must carry certain Non-Microsoft Middleware, including but not limited to the Java Virtual Machine, in its distribution of the Windows Operating System."

"A requirement that Microsoft manufacture and distribute the Windows Operating System without any Microsoft Middleware or corresponding functionality included."

"A requirement that Microsoft continue to support fully industry standards if it chooses or claims to adopt them or extends or modifies their implementation."

"requirement that Microsoft waive any rights to intellectual property in related APIs, communications interfaces and technical information if the Court finds that Microsoft exercised a claim of intellectual property rights to prevent, hinder, impair or inhibit middleware from interoperating with the operating system or other middleware."

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btw, this 'Factual Background' from the CIS is false:

"Operating systems designed for Intel-compatible personal computers do not run on other personal computers, and operating systems designed for other personal computers do not run on Intel-compatible personal computers"

This myth might have been perpetuated since Microsoft's operating systems typically cannot run on platforms other than x86 compatible ones.

NetBSD and Linux are two contrary examples of operating systems that run on Intel-compatible personal computers and *do* run on other personal computers.

Thank you for your time and opportunity to voice my comments, have a wonderful day.

Norman J. Harman Jr.
njharman@knoggin.com
San Francisco CA

This document has also been sent by 1st class US Mail to:

Renata Hesse
Trial Attorney
Antitrust Division
U.S. Department of Justice
601 D Street, N.W., Suite 1200
Washington, D.C. 20530